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Renter Protected Only at Time of Leasing Agreement

Sandra Berzups

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Akers and his sales personnel sold a total of seventeen vehicles, identified as "factory cars," to the plaintiffs in this consolidated action. In each case, the prospective buyer had been informed by Akers or his staff that the car to be sold was a "demo" or a "factory demo." Additionally, all of the plaintiffs obtained their financing through the dealership. Many of these retail installment sales contracts either falsely identified the vehicles in question as new or "demos," or falsely listed the seller as Chrysler Corporation rather than the car rental agency that actually had owned the vehicle. In addition, the sales contracts often stated either an inflated value for the car purchased or a decreased value for the car traded in to reduce the amount of tax the dealership owed to the state.

Only the dealership liable

Eddie and Mary Bowling filed the initial suit against Akers. Subsequently, some of the Bowlings' allegations

were published in the local newspaper. Ultimately, sixteen additional lawsuits against the dealership were filed. In total, the plaintiffs alleged twenty-one complaints involving common law fraud and violations of both the Magnuson-Moss Warranty Act, and the West Virginia Consumer Credit and Protection Act.

The cases were consolidated for trial and proceeded only on the common law fraud allegations. After all the evidence was presented, the trial court directed a verdict for Akers, the president. Although the jury returned a compensatory damage verdict against the corporation, it denied an award of punitive damages. The trial court also refused to award attorney fees and denied the dealership's motion for a judgment notwithstanding the verdict, or in the alternative, for a remittitur based on the depreciation of the vehicles from the time of purchase to the time of trial.

The plaintiffs appealed the trial court's decision. On appeal, they contended that the court erred both in
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Renter protected only at time of leasing agreement

By Sandra Berzups

In *Richwind Joint Venture 4 v. Brunson*, 645 A.2d 1147 (Md. 1994), the Court of Appeals of Maryland held that a landlord who knows or has reason to know of a threat from lead-based paint on the rental premises may be liable for negligence arising from either common law or statutory duty when she failed to correct the situation in a timely manner. However, the court also held that under the Maryland Consumer Protection Act ("CPA"), a landlord could be held liable neither for renting a unit with intact lead-based paint nor for failing to respond to the hazardous conditions resulting from lead-based paint in the absence of notice. To find otherwise would subject the landlord to a strict liability standard for

defects occurring on the premises. Furthermore, the court declared that the CPA is limited to material misstatements and omissions occurring solely at the inception of the lease and does not apply to those that may occur during the term of the lease. Such grievances may be best addressed by the state's comprehensive landlord and tenant statutes and common law remedies.

Lead paint violations cited

In December 1983, Barbara Richardson took possession of a residential rental property in Baltimore owned by Harry and Rita Baitch. While residing there, she gave birth to two children, Jamika and Jamall. Subsequently, in December 1985, the Baitches sold the rental property to Richwind Joint

Venture ("Richwind"), a general partnership. Richwind then hired Scoken Management Corporation ("Scoken") to manage the property. In part, Richwind had selected Scoken because its president, Mark Chodak, had extensive experience in rental property management and had once worked as a housing inspector in Baltimore. At the time of purchase, there were no outstanding building violation notices against the property. However, neither Richwind nor Scoken personally inspected the premises.

Upon assuming ownership of the property, Richwind notified Richardson of the management change. Beginning January 15, 1986, Richardson sent Scoken a series of complaint letters describing the poor conditions of the premises. In one letter, she specifically

informed Scoken that the paint and plaster were peeling from the walls of the rental property. In response, Chodak dispatched a Scoken employee to correct the problem. However, Chodak did not personally inspect the premises, nor did anyone follow up to determine whether the problem had been corrected.

On September 3, 1986, the Kennedy Institute Lead Poisoning Prevention Program diagnosed both of Richardson's children as having elevated blood-lead levels. In addition, the younger of the two, Jamall, was hospitalized and underwent chelation therapy, a drug treatment that assists the body in removing lead from the blood.

Following this hospitalization, the Baltimore City Health Department inspected the rental property. Upon completing its inspection, it issued an "Emergency Violation Notice and Order to Remove Lead Nuisance" to Richwind and Chodak, citing forty-two specific lead paint violations of the Baltimore City Code ("Code").

Tenant alleges negligence

Richardson filed a complaint in the Baltimore Circuit Court on behalf of her two children for injuries sustained as a result of exposure to lead-based paint. Ernestine Brunson, the children's grandmother, substituted as plaintiff upon Richardson's death.

In her complaint, Brunson alleged that the defendants—Richwind, Scoken, and the Baitches (hereafter collectively referred to as Richwind)—were negligent, created a nuisance, and violated the CPA. Specifically, Brunson alleged that

Richwind breached its duty to protect its tenants from injury caused by the lead-based paint on the leased premises. She also contended that Richwind violated the CPA by failing to disclose the unsafe conditions of lead-based paint at the inception of the lease.

Rita Baitch settled before the trial. In addition, the trial court dismissed the nuisance claim against the remaining defendants. At trial, the court granted the defendants' motion for judgment on the CPA counts. However, the jury subsequently returned a verdict in favor of the plaintiffs on the negligence claim, awarding over \$500,000 in compensatory damages to the children and damages to Richardson's estate.

The defendants then appealed the jury's verdict and Brunson cross-appealed. The Court of Special Appeals affirmed the jury's finding of negligence but reversed the lower court's judgment on the CPA claim. The Court of Appeals of Maryland granted certiorari to address two issues: (1) whether a landlord's liability based on statutory and common law requires notice and reasonable time to correct a defect; and (2) whether the CPA imposes strict liability for personal injury upon a landlord without proof of knowledge, deception, reliance, or causation.

Notice required

On appeal, Richwind first argued that liability for negligence can only be imposed when the landlord has actual knowledge of the defective condition on the premises, a contractual duty to repair such

conditions, and a reasonable opportunity to correct the situation. Furthermore, Richwind contended that statutory provisions, which it conceded may affect the common law requisites for liability, cannot supersede the common law requirement of notice and opportunity to correct.

The court accepted Richwind's concession that statutory enactments may affect the fundamental nature of the landlord-tenant relationship, imposing duties on the landlord beyond those required by common law. For example, in the case at bar, the court noted that the Code's implied warranty of habitability provided that dwellings be "kept in good repair, in safe condition, and fit for human habitation." Moreover, the Code also provided that such hazardous conditions as flaking, loose, or peeling lead-based paint render a premise unfit for human habitation. From its reading of the Code, the court concluded that a landlord was under a statutory obligation to correct a hazardous condition, such as peeling or flaking lead-based paint. Furthermore, it declared that evidence of the municipal violation provided notice of the defective condition. In such cases, the tenant herself was not required to provide additional notice to the landlord.

Continuing its analysis, the court then examined whether the Code's provisions expanded common law liability. It observed that the statutory provisions in question provided for both notice to the landlord and opportunity to correct the defective condition in a manner analogous to common law. The court of appeals thus concluded that the

Code reinforced rather than superseded the common law prerequisites for a claim of negligence.

Landlord knew of defect

The court next addressed the issue of whether Richwind or its agent had adequate knowledge of the hazardous condition resulting from the lead-based paint on the rental premises. To make its determination, the court reviewed the trial record. It concluded that Chodak's testimony at trial indicated that he possessed adequate general knowledge from his years of experience in the Baltimore City housing market that older homes, such as the rental property in question, often contained lead-based paint that could be dangerous to children if peeling or flaking. Furthermore, the court declared that the jury could reasonably find that Chodak possessed specific knowledge regarding the peeling lead-based paint from Richardson's complaint letters. From these sources, the court concluded that Richwind had adequate notice of the hazardous condition on the property.

Having found that Richwind possessed adequate notice, the court concluded that the landlord had negligently failed to remove the hazard properly even though there had been opportunity to do so. Therefore, it held there was sufficient evidence to support the jury's verdict of negligence on the part of the landlord.

Law's application limited

Resolving the negligence claim in favor of the plaintiffs, the court of

appeals then addressed the issue of the alleged CPA violations. In its analysis, the court first examined the legislative history of the CPA. It noted that the CPA, passed in 1975 and amended in 1976, set certain minimum statewide standards to protect consumers from unfair and deceptive trade practices, including those involving rental consumer realty. Turning specifically to the issue of deceptive practices between landlords and tenants, the court stated its belief that the legislature had intended the CPA to apply to deceptive statements and omissions concerning rental property only at the inception of the lease, and not those that may occur during the course of the agreement. In reaching this conclusion, the court noted that the General Assembly had created a comprehensive system of landlord/tenant laws, in addition to existing common law, to regulate landlord behavior during the course of the lease. Additional protections would be unnecessary. Furthermore, the court suggested that expanding the CPA to cover deceptive practices beyond the inception of the lease would impose a standard equivalent to strict liability on the landlord for any defect arising on the premises. The court stated that this exceeded the scope of the CPA as envisioned by its creators. Consistent with this interpretation, the court similarly reasoned that a landlord's silence about a condition arising during the term of the lease, rather than prior to or at the time the lease was entered into, was not a violation of the CPA. It noted that at such times, the tenant, who had acquired control over the property, possessed greater knowledge about its condition than

the landlord, who had relinquished her exclusive control.

In the present case, the court noted that when Richardson signed the lease, there was no evidence of peeling or chipping paint on the rental property. If there had been, a CPA claim could have been brought against the Baitches, the owners of the premises at that time. However, when Richwind took title, Richardson had been in exclusive possession and control for two years. Because superior knowledge of the premises had shifted to the tenant, no CPA cause of action could be brought against Richwind for deceptive practices at the inception of the lease, or its subsequent silence about the conditions. Accordingly, the court held that Richwind had not violated the CPA.

In summary, the Court of Appeals of Maryland found Richwind negligent for its failure to respond to notice of the hazards created by the peeling lead-based paint on its rental property. However, it was not liable for violations under the CPA.

Hospital liable

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to create an exception where the legislature did not intend one.

No time limit on claim

The defendant then contended that both of Bell's claims had been properly dismissed as they were barred by the state's medical malpractice statute of limitations. This statute requires plaintiffs to file claims against a health care provider

no more than two years from the occurrence of the health care provider's malpractice, negligence, error, or mistake. In response, Bell argued that the statute did not limit her strict products liability claim because it applied only to claims of malpractice or negligence.

The appellate court agreed that the Missouri statute in question applied only to malpractice, negligence, error, or mistake claims related to health care. It observed that each of these classifications connoted an element of fault on the defendant's part. On the other hand, strict products liability required no showing of fault. As such, the court found that Bell's strict products liability claim could not be properly characterized as a claim that would be barred by the statute. Consequently, the court held that the medical malpractice statute of limitations applied only to Bell's negligence claim and not to her strict products liability claim. The Missouri Court of Appeals affirmed the trial court's summary judgment as to Bell's claim of negligence. However, it reversed the summary judgment as to the strict products liability claim and remanded it for further proceedings.

Fraudulent scheme

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directing a verdict for Akers and in denying an award of reasonable attorney's fees.

On appeal, the Supreme Court of Appeals of West Virginia first turned to the issue of whether the lower court had erred in directing a verdict for Akers. The appellate court, after

looking at the laws of other states, concluded that if an officer or director of a corporation "directed, sanctioned, or participated in the wrongful acts, including fraud," then the officer may be personally liable for the tortious acts of the corporation. Furthermore, it held that the officer need not have actual knowledge of the fraudulent acts. Instead, constructive knowledge was sufficient. Additionally, evidence of this constructive knowledge can be proven by circumstantial evidence, including "evidence of similar transactions in the course of a systematic way of doing business."

Applying these standards to Akers, the appellate court focused on the direct and circumstantial evidence available and found that a jury could reasonably find that Akers sanctioned the fraudulent activities. It pointed specifically to the fact that Akers: (1) purchased the vehicles with full knowledge that they were used rental cars; (2) directed his lot employees to remove any evidence from the vehicles that they had been rental cars; (3) advertised the cars as "factory cars" with full knowledge that they were not; (4) conceded at trial that the terms of the advertisements were likely to mislead consumers; (5) testified that he was fully aware of everything that occurred with respect to his business; (6) wrote a letter to the editor of the local newspaper claiming full responsibility for the sales and service provided at the dealership; and (7) signed sixteen of the sales installment contracts which contained false and misleading information. In light of these circumstances, the court found that there was ample evidence from

which a jury could conclude that Akers knew, approved of, and sanctioned the fraudulent plan. The court therefore held that the trial court erred in directing a verdict for Akers and remanded the case for a new trial.

Attorney's fees available

The trial court refused to grant the plaintiffs reasonable attorney's fees because punitive damages, a prerequisite to attorney's fees in a fraud action, had not been awarded. The appellate court, however, found that denial of punitive damages did not preclude an award of reasonable attorneys' fees. Rather, it concluded that a finding of fraud is an action in bad faith, and thus, is exempted from the general rule that precludes an award of attorney's fees.

In making this determination, the appellate court focused on the popular understanding of the term "fraud," which contains an element of "moral turpitude or bad faith." It reasoned that the plaintiffs had made a sufficient showing that the dealership acted in bad faith and that these actions resulted in injury to the plaintiffs. Consistent with this analysis, the court held that the plaintiffs were entitled to reasonable attorney's fees, in addition to compensatory damages.

Recent laws

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The Illinois General Assembly, seeking to improve the relationship between home buyers and both real estate brokers and salespeople, recently passed the Brokerage

Relationships in Real Estate Transactions Act. Taking effect September 1, 1994, this law amended the state's 1983 Real Estate Licensing Act by creating Article IV.

Article IV defines the roles and duties of all parties in a real estate transaction and specifies the accountability of each party to the others. Through the definition of roles and duties, Article IV eliminates a common-law agency relationship between consumers and real-estate brokers and salespeople. By eliminating the common law concepts of principal, agent, and fiduciary duty, Article IV creates private rights of action and defense under the Act. For example, the law requires that brokers and salespeople treat all customers honestly and that they should not negligently or knowingly give consumers false information. Additionally, brokers and salespeople must disclose all material facts pertaining to the physical condition of the property that are actually known to them or that could reasonably be discovered by a reasonable and diligent inspection. However, brokers or agents are not responsible when false information is provided by the client or when they did not have actual knowledge that the informa-

tion was false.

Information regarding the physical condition of houses to be sold will likely be provided from sellers to brokers or salespeople in the form of a questionnaire. The provided information will include knowledge of any problems or defects with the property's foundation, plumbing, roof, furnace or other physical features. 225 ILCS 455/38 (1994).

Wholesale defined

Springfield, Ill.—“Wholesale” means “wholesale.”

Illinois Governor Jim Edgar recently signed legislation amending the state's Consumer Fraud and Deceptive Practices Act. The recent addition of Section 2CC to the Act provides that a person, firm, or corporation offering merchandise for retail sale by advertising that the merchandise is for sale at “wholesale” or “wholesale price” is guilty of an unlawful practice and subject to penalties as prescribed in the Act.

The amendment makes it an unlawful practice to advertise directly or by implication that an individual or a company is a wholesaler or sells merchandise at wholesale to the public. In order to

sell merchandise at wholesale, a person or company must make a substantial and significant number of sales for resale in the ordinary course of business and substantiate savings on the prices offered as compared to merchandise offered for sale by retailers in the trade area.

Furthermore, this law now governs the sale of individual items sold by a person or company in a retail setting. Accordingly, a seller may only advertise or sell merchandise as “wholesale” if she can substantiate significant savings as compared to retail prices. 815 ILCS 505/2CC (1995).

Pricing practice

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Arkansas Supreme Court, however, concluded that Wal-Mart's practice of selling selected items below cost was an attempt to attract customers and is “markedly different from a sustained effort to destroy competition. Furthermore, the court held that this practice was not illegal under state law and was justified as a way to “foster competition and to gain a competitive edge as opposed to a stratagem to eliminate rivals altogether.”

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